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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
Washington, DC 20529-2090



**U.S. Citizenship
and Immigration
Services**

B5

FILE:

Office: NEBRASKA SERVICE CENTER

Date:

DEC 02 2010

IN RE:

Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching your decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you.

Perry Rhew

Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a dental firm. It seeks to employ the beneficiary permanently in the United States as a dentist. As required by statute, an ETA Form 9089 Application for Permanent Employment Certification approved by the Department of Labor (DOL), accompanied the petition. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage and denied the petition accordingly.

On appeal, the petitioner, through counsel, submits additional evidence and contends that the petitioner has demonstrated its ability to pay the proffered wage and that the petition should be approved.

The AAO conducts appellate review on a *de novo* basis. The AAO's *de novo* authority is well recognized by the federal courts. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).¹

Section 203(b) of the Act states in pertinent part that:

(2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability.--

(A) In General. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.

The regulation at 8 C.F.R. § 204.5(g) (2) states, in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

¹The procedural history of this case is documented in the record and is incorporated herein. Further references to the procedural history will only be made as necessary.

The petitioner must demonstrate that it has the continuing financial ability to pay the proffered wage beginning on the priority date, the day the ETA Form 9089 was accepted for processing by any office within DOL's employment system. See 8 C.F.R. § 204.5(d); *Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). Here, the ETA Form 9089 was accepted for processing on January 15, 2008.² The proffered wage for a "dentist, general,"³ is stated as \$61.00 per hour, which amounts to \$126,880 per year. The ETA Form 9089 was signed by the beneficiary on March 24, 2008. There is no indication that the petitioner has employed the beneficiary as of the date of signing.

The Immigrant Petition for Alien Worker, (Form I-140) was filed on April 7, 2008. Part 5 of the petition indicates that the petitioner was established in 1997, claims a gross annual income of \$200,000 and currently has two employees.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. See *Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977); see also 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, United States Citizenship and Immigration Services (USCIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the overall circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. See *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

² If the petition is approved, the priority date is also used in conjunction with the Visa Bulletin issued by the Department of State to determine when a beneficiary can apply for adjustment of status or for an immigrant visa abroad. Thus, the importance of reviewing the *bona fides* of a job opportunity as of the priority date, including a prospective U.S. employer's ability to pay the proffered wage is clear.

³ In response to the director's request for evidence, the petitioner cites to orthodontic patients and extractions referred out. The labor certification was filed for a "dentist, general," and not an orthodontist, or oral surgeon, which might require different skills and a higher pay rate. A labor certification for a specific job offer is valid only for the particular job opportunity, the alien for whom the certification was granted, and for the area of intended employment stated on the Form ETA 750. 20 C.F.R. § 656.30(C)(2). Without more, it seems that the petitioner intends to employ the beneficiary outside the terms of the ETA Form 9089. See *Sunoco Energy Development Company*, 17 I&N Dec. 283 (change of area of intended employment).

In support of its ability to pay the proffered wage of \$126,880 per year, the petitioner provided copies of its Form 1120, U.S. Corporation Income Tax Return for 2006 and 2007.⁴ The returns indicate that the petitioner's fiscal year is a standard calendar year. They also contain the following information:

Year ⁵	2006	2007
Net Income	-\$55	-\$ 2,718
Current Assets	\$-0-	\$ -0-
Current Liabilities	\$-0-	\$ -0-
Net Current Assets	\$-0-	\$ -0-

Besides net income and as an alternative method of reviewing a petitioner's ability to pay a proposed wage, USCIS will examine a petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.⁶ It represents a measure of liquidity during a given period and a possible resource out of which the proffered wage may be paid for that period. In this case, the corporate petitioner's year-end current assets and current liabilities are shown on Schedule L of its federal tax returns. Here, current assets are shown on line(s) 1 through 6 and current liabilities are shown on line(s) 16 through 18 of Schedule L. If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the corporate petitioner is expected to be able to pay the proffered wage out of those net current assets.⁷

⁴On Form 1120, the petitioner's net income is found on line 28 (taxable income before net operating loss deduction and special deductions). USCIS uses a corporate petitioner's taxable income before the net operating loss deduction as a basis to evaluate its ability to pay the proffered wage in the year of filing the tax return because it represents the net total after consideration of both the petitioner's total income (including gross profit and gross receipts or sales), as well as the expenses and other deductions taken on line(s) 12 through 27 of page 1 of the corporate tax return. Because corporate petitioners may claim a loss in a year other than the year in which it was incurred as a net operating loss, USCIS examines a petitioner's taxable income before the net operating loss deduction in order to determine whether the petitioner had sufficient taxable income in the year of filing the tax return to pay the proffered wage.

⁵Both of these tax returns are before the January 2008 priority date. The petitioner must establish its ability to pay the proffered salary from the priority date onward.

⁶ According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

⁷ A petitioner's total assets and total liabilities are not considered in this calculation because they include assets and liabilities that, (in most cases) have a life of more than one year and would also include assets that would not be converted to cash during the ordinary course of

The petitioner also provided a statement from [REDACTED] dated August 14, 2008. He affirms that he incorporated his dental practice in 1997 and owns it "free and clear." He also is a sole practitioner and wishes to hire the beneficiary as an associate, which he believes would expand the practice. [REDACTED] asserts that he is going to sign up with other insurance plans in order to increase his patient base and will keep the practice open for five and a half days.

Additionally, the petitioner provided copies of unaudited financial statements for the months of January 2008 through June 2008.

The director concluded that the tax returns failed to demonstrate sufficient resources to pay the proposed wage offer of \$126,880 and denied the petition accordingly. The director noted that neither the petitioner's net income or net current assets were sufficient to cover the proffered wage, and further observed that assertions of increased net income through the addition of the beneficiary were speculative. Finally, the director noted that the financial statements submitted relevant to 2008 were not audited and therefore could not be considered reliable evidence. contract dentists who will accept the plan's covered persons.

On appeal, and pursuant to *Matter of Sonegawa*, 12 I&N Dec. 612 (BIA 1967), counsel asserts that hiring the beneficiary will increase the business of the dental practice. He also maintains that the tax structure of the petitioner as a personal services corporation should be considered as part of its overall financial profile in that it is subject to a higher tax rate than other corporate entities and would normally divert earnings to salaries or wages to employee-shareholders in order to reduce taxable liability. In this respect, counsel also submits copies of [REDACTED] individual income tax return for 2007 and a copy of the corresponding Form 1099 showing \$30,000 paid as Miscellaneous Income. The individual tax return shows individual adjusted gross income of \$63,010. Counsel also provides a copy of a contract between a dental plan identified as "DeCare" and [REDACTED] has agreed to become one of the listed dentists. He signed the contract on September 9, 2008, after the priority date.

The assertions of counsel are not persuasive in this case. With respect to the personal income of [REDACTED] as shown on his Form 1099 and the individual 2007 income tax return, it is noted that even if the entire \$63,010 in individual gross income were to be considered, which it cannot be, it is half of the amount necessary to cover the beneficiary's proposed wage offer of \$126,880 per year. The petitioner is a corporation. Because a corporation is a separate and distinct legal entity from its owners and shareholders, the assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. See *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). It is noted that in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003), the court stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits

business and will not, therefore, become funds available to pay the proffered wage.

[USCIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage.”⁸

As noted by the director, unaudited financial statements that were submitted to the underlying record are not sufficient to demonstrate the petitioner’s ability to pay the proposed wage offer. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. An audit is conducted in accordance with generally accepted auditing standards to obtain a reasonable assurance that the financial statements of the business are free of material misstatements. The unaudited financial statements that counsel submitted with the petition are not persuasive evidence. They represent the unsupported representations of management and are not probative of the petitioner’s ability to pay the proffered wage. We additionally note that even if reviewed, the unaudited income statement for June 30, 2008 indicates that the petitioner’s net income was -\$5,390.89.

As noted by the director, the record does not indicate that the beneficiary has been employed by the petitioner. If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during a given period, USCIS will next examine the net income figure reflected on the petitioner’s federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); *Taco Especial v. Napolitano*, 696 F. Supp. 2d. 873, (E.D. Mich. 2010). Reliance on federal income tax returns as a basis for determining a petitioner’s ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff’d*, 703 F.2d 571 (7th Cir. 1983). Showing that the petitioner’s gross sales and profits exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, had properly relied on the petitioner’s net income figure, as stated on the petitioner’s corporate income tax returns, rather than the petitioner’s gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. See *Taco Especial v. Napolitano*, 696 F. Supp. 2d. at 881 (gross profits overstate an employer’s ability to pay because it ignores other necessary expenses).

With respect to depreciation as claimed by counsel, the court in *River Street Donuts* noted:

⁸ While a sole shareholder’s amounts of officer compensation may be considered in some circumstances, the tax returns here do not show any amounts paid in officer compensation.

The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner's choice of accounting and depreciation methods. Nonetheless, the AAO explained that depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that even though amounts deducted for depreciation do not represent current use of cash, neither does it represent amounts available to pay wages.

We find that the AAO has a rational explanation for its policy of not adding depreciation back to net income. Namely, that the amount spent on a long term tangible asset is a "real" expense.

River Street Donuts at 116. "[USCIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support." *Chi-Feng Chang* at 537 (emphasis added).

In this case, neither of the petitioner's submitted tax returns for the time period before the priority date would indicate an ability to pay the proffered wage of \$126,880. In 2006, neither the petitioner's reported net income of -\$55, nor its \$-0- in net current assets could cover the certified salary. Similarly, in 2007, neither its net income of -\$2,718, nor its \$-0- in net current assets could establish its ability to pay the proffered wage as of the priority date of January 15, 2008.

As mentioned above, *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967), is sometimes applicable where other factors such as the expectations of increasing business and profits overcome evidence of small profits. That case, however relates to petitions filed during uncharacteristically unprofitable or difficult years within a framework of profitable or successful years. During the year in which the petition was filed, the *Sonogawa* petitioner changed business locations, and paid rent on both the old and new locations for five months. There were large moving costs and a period of time when business could not be conducted. The Regional Commissioner determined that the prospects for a resumption of successful operations were well established. He noted that the petitioner was a well-known fashion designer who had been featured in *Time* and *Look*. Her clients included movie actresses, society matrons and Miss Universe. The petitioner had lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonogawa* was based in part on the petitioner's sound business reputation, historical growth and outstanding reputation as a couturiere.

As in *Matter of Sonegawa*, the USCIS may, at its discretion, consider overall circumstances of a petitioner such as its historical growth, overall number of employees, reputation and other uncharacteristic difficult years within a framework of profitable years.

In the present matter, the petitioner has identified itself on IRS Form 1120 as a "personal service corporation." Pursuant to *Matter of Sonegawa, supra*, the AAO notes that the petitioner's personal service corporation status is a relevant factor to be considered in determining its ability to pay. A personal service corporation is a corporation where the "employee-owners" are engaged in the performance of personal services. The Internal Revenue Code (IRC) defines "personal services" as services performed in the fields of health, law, engineering, architecture, accounting, actuarial science, performing arts, and consulting. 26 U.S.C. § 448(d)(2). As a corporation, the personal service corporation files an IRS Form 1120 and pays tax on its profits as a corporate entity. However, under the IRC, a qualified personal service corporation is not allowed to use the graduated tax rates for other C-corporations. Instead, the flat tax rate is the highest marginal rate, which is currently 35 percent. 26 U.S.C. § 11(b)(2). As noted above, because of the high 35% flat tax on the corporation's taxable income, personal service corporations generally try to distribute all profits in the form of wages to the employee-shareholders. In turn, the employee-shareholders pay personal taxes on their wages and thereby avoid double taxation. In this case however, we do not find that the petitioner's status as a personal services corporation and its effect on a particular tax strategy taken by the petitioner outweighs the observation that the petitioner reported no compensation of officers in either 2006 or 2007 and the salaries and wages shown on line 13 was a modest \$22,982 in 2006 and \$37,060 in 2007. It is unclear where the \$30,000 on the Form 1099 issued to [REDACTED] was listed on the 2007 corporate tax return, but as herein noted, even if these salaries and wages were applied to pay the proffered wage in either year, they fell well short of the certified salary of \$126,880.

Other assertions in this case pointed to the beneficiary's skills and [REDACTED] September 9, 2008, agreement to become a listed dentist under a dental plan, as a basis for the increase of the petitioner's profit. We note that increased revenue also produces increased expenses. The evidence in this record is simply too speculative to establish that the petitioner's ability to pay the proffered wage was established as of the priority date of January 15, 2008. This hypothesis cannot be concluded to outweigh the evidence presented in the tax returns. Against the projection of future earnings, *Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 1977) states:

I do not feel, nor do I believe the Congress intended, that the petitioner, who admittedly could not pay the offered wage at the time the petition was filed, should subsequently become eligible to have the petition approved under a new set of facts hinged upon probability and projections, even beyond the information presented on appeal.

Although it is recognized that the petitioner exhibited an increase in gross receipts or sales from \$148,930 in 2006 to \$189,430 in 2007, unlike the *Sonegawa* petitioner, the instant petitioner has not submitted sufficient evidence demonstrating that uncharacteristic losses, factors of outstanding reputation or other circumstances that prevailed in *Sonegawa* that are persuasive in this matter. Further, neither tax return demonstrated that either the petitioner's net income or net current assets could cover the proffered wage of \$126,880, which is almost as much as the petitioner's entire gross receipts in 2006. The AAO does not conclude that the petitioner has established that it has had the continuing ability to pay the proffered wage. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

The regulation at 8 C.F.R. § 204.5(g)(2) requires that a petitioner establish a *continuing* financial ability to pay the proffered wage beginning at the priority date. (Emphasis added.) Upon review of the evidence contained in the record and submitted on appeal, the AAO concludes that the evidence failed to demonstrate that the petitioner has had the continuing ability to pay the proffered wage.

Beyond the decision of the director, it is noted that the regulation at 8 C.F.R. 204.5(g) requires that evidence relating to the experience or training of the beneficiary must consist of letters from the pertinent employer or trainer and must identify the author, title, and address, and must describe the experience or training received. In this matter, Part H-6 of the ETA Form 9089 requires that the beneficiary have 24 months of experience in the job offered as a dentist. No evidence verifying this employment is contained in the record. The petition will be denied on this independent and alternative basis.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 299 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004)(AAO's *de novo* authority well recognized in federal courts).

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.